IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.175 OF 2004

Shyamsundar N. Sathe & Anr. ... Applicants

Vs.

Anant Vishwanath Joshi ... Respondent

Mr. M.D. Angal for the applicants.

Mr. N.P. Deshpande for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 15TH FEBRUARY, 2005.

P.C.:-

1. This civil revision application is filed by the original decree holders / tenants / defendants (for convenience, "the decree holders") in Civil Suit No.1100 of 1988 filed in the Small Causes Court at Pune. The respondent is original judgment debtor / landlord / plaintiff (for convenience, "the judgment debtor").

2. The material facts may be shortly stated. The civil suit was filed by the judgment debtor against the decree holders for possession of the suit premises on the ground of acquisition of alternate accommodation by the decree holders. The suit was decreed on 9/3/1994. The decree holders' appeal was dismissed. The decree holders filed writ petition being Writ Petition No.4407 of 1996 in this court. In that petition, the parties entered into a

compromise. The consent terms were filed in this court on 12/9/1996. The decree was passed in terms of the consent terms.

3. According to the decree holders, the judgment debtor failed to execute the consent decree. Hence, the decree holders filed execution proceedings being R.D. No.31 of 2001 to get the consent decree dated 12/9/1996 executed. By the impugned order, the executing court dismissed the execution proceedings and, hence, the decree holders have filed this civil revision application.

4. I have heard Mr. Angal, the learned counsel appearing for the decree holders. He contended that the decree holders were to hand over possession of the suit premises to the judgment debtor by 16/10/1996. However, as the judgment debtor did not execute the agreement as per clause (2) of the consent terms, the possession could not be handed over. Hence, the judgment debtor filed a contempt petition. The possession of the suit premises was handed over by the decree holders on 16/1/1997. In view of this, on 17/1/1997, Justice R.M. Lodha, disposed of the contempt petition. Mr. Angal contended that the judgment debtor was to hand over the flat to the decree holders by 14/4/1998 as per the consent terms. However, it was not handed over. Hence, the decree holders filed civil application in the contempt petition praying that the judgment debtor may be directed to enter into an agreement with the decree holders as per clause (2) of

the consent terms. On 7/5/1997, Justice J.N. Patel directed the judgment debtor to enter into an agreement with the decree holders within six weeks. The judgment debtor remained absent when the order was passed.

5. The judgment debtor then filed a review application. On 23/6/1997, Justice K.K. Baam stayed the order dated 7/5/1997 passed by Justice J.N. Patel. On 8/12/2003, Justice J.N. Patel rejected the review application. Mr. Angal contended that on account of the stay order, which was in operation from 23/6/1997 till 8/12/2003, the agreement could not be executed and the decree holders could not get possession of the flat. Hence, the decree holders filed a contempt petition. On 25/2/1999, while dismissing the contempt petition, Justice D.K. Deshmukh observed that the breach of undertaking by the tenant may not be wilfull. He, however, observed that there may be a remedy available to the decree holders for executing the consent order. Mr. Angal contended that in view of this, the decree holders have taken out the instant proceedings. Mr. Angal contended that the judgment debtor has wilfully not abided by the consent decree. Initially, the judgment debtor did not execute the agreement as per clause (2) of the consent terms. Thereafter, though the possession was handed over by the decree holders, he did not execute the agreement despite Justice J.N. Patel's order. He got Justice J.N. Patel's order stayed. Hence, the agreement could not be executed and the decree holders could not get possession

of the flat till the stay order was vacated. Mr. Angal contended that the judgment debtor is guilty of wilful default and, hence, penal clause (6) of the consent terms must come into operation and the decree holders must get one and half times the market price of the said flat.

6. Mr. Angal contended that the learned judge has wrongly attributed breach of the terms of the consent decree to the decree holders. The decree holders did not hand over possession of the suit premises on or before 16/10/1996 because the judgment debtor did not execute the agreement as per clause (2) of the consent terms. Mr. Angal contended that the learned judge came to a wrong conclusion that there is no document on record to show that the decree holders have paid the amount as agreed by them. He submitted that the amount was tendered to him but he refused to accept the same. Relying on the judgment of this court in **Sonusing Dhanusing Patil and another v. Bansi Chindu Kumbhar, 1993 Mh.L.J., 1141**, Mr. Angal urged that when the court, after accepting the terms agreed upon by the parties, passes a decree in terms thereof, the terms get the legal character and the decree of the court cannot be considered to be an agreement or contract between the parties. He contended that the executing court has treated the consent terms as an agreement between the parties. The executing court should have merely implemented clause (6) of the consent terms. It has travelled in a forbidden area. He submitted that,

therefore, the impugned order be set aside.

7. It is difficult to agree with Mr. Angal. Above facts make it clear that there are lapses on the part of both the sides. Whereas Justice R.M. Lodha found that the decree holders were defiant in their attitude in flouting the compromise entered into between the parties, Justice D.K. Deshmukh observed that non delivery of possession of the suit premises by the decree holders cannot be termed as a wilful or deliberate disobedience or disregard of any of the agreed terms. He, however, refrained from expressing any final opinion and observed that there may be a remedy of executing the order passed by this court, open to the decree holders. Justice J.N. Patel in his order observed that the judgment debtor had not complied with the undertaking given to this court.

8. It is in the light of the above observations of the learned judges of this court that the executing court has held that it is difficult to say as to whether the judgment debtor is or is not liable to pay one and half times market price of the flat. He cannot be faulted for this observation. It is wrong to say that the executing court has interpreted the consent terms as a contract. It must be remembered that in the instant case on account of the conduct of the parties the consent terms did not retain its original form. Therefore, some amount of interpretation of the conduct of the parties, in the light of the above observations of this court, was

inevitable. The executing court has, therefore, found a better way out. The learned judge asked the judgment debtor whether he was ready to hand over the possession of the flat to the decree holders. The judgment debtor filed a pursis stating that he is ready to hand over the flat to the decree holders. The decree holders, however, filed a pursis stating that they are not ready to take possession of the said flat. It is their stand that since they have started execution proceedings, the question of taking possession of the said flat does not arise. The decree holders have insisted that the court should issue a warrant under Order XXI, Rule 43 of the Code of Civil Procedure (for short, "the Code") against the judgment debtor.

9. In my opinion, the executing court is right when it observes that in the facts of this case, if warrant under Order XXI, Rule 43 of the Code is issued, it would be a case of causing injustice to the judgment debtor because he is ready to hand over possession of the flat to the decree holders. In the peculiar facts of this case, only such a view would be just and proper. It would result in executing the decree without causing injustice or hardship to either party. The executing court has rightly dismissed the execution proceedings. In view of this, the civil revision application stands dismissed.

(SMT. RANJANA DESAI, J.)